BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In re Applications Of	:	
	:	
LIBERTY CABLE CO., INC.	:	
	:	
For Private Operational Fixed Microwave Service Authorization and Modifications	:	WT DOCKET NO. 96-41
	:	
New York, New York	:	

MOTION BY TIME WARNER CABLE OF NEW YORK CITY AND PARAGON CABLE MANHATTAN FOR LIMITED DISCOVERY AND THE TAKING OF ADDITIONAL HEARING TESTIMONY, OR, IN THE ALTERNATIVE, TO ENLARGE ISSUES

& ALJ

Arthur H. Harding
R. Bruce Beckner
Jill Kleppe McClelland
Debra A. McGuire
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

Attorneys for
TIME WARNER CABLE OF NEW YORK CITY
and
PARAGON CABLE MANHATTAN

Dated: March 3, 1997

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY

Two additional pieces of evidence that became available after the hearing have sufficiently important implications for this proceeding to justify limited additional discovery and, following completion of that discovery, augmentation of the hearing record. This new evidence plus the apparent fact that Liberty began operating at least one microwave facility in 1993 prior to receiving a grant of authority to do so, raises a matter of decisional significance that significantly impacts the public interest in acting on Liberty's applications.

The first item of new evidence is the April 20, 1993 letter from Liberty's FCC counsel to its executive vice president that reports a conversation between counsel and Behrooz Nourain, Liberty's chief engineer. In that conversation, Mr. Nourain apparently revealed the Liberty had operated or was operating some microwave facilities prior to receiving FCC authority to do so. The letter goes on to spell out, in detail, both what actions Liberty can take prior to receiving a grant of FCC authority to operate a new microwave facility and how long to expect the Commission to take to process applications for such authority.

The second item is the request of Howard Barr, another of Liberty's FCC counsel, to change his hearing testimony in a way that limits his answer to the question of whether, before April 27, 1995, he heard a suggestion that Liberty was operating unlicensed microwave facilities to the January — April 1995 time period. Taken together, these two items of new evidence raise a substantial question of fact as to whether Liberty was operating unlicensed facilities in 1993, and whether, in light of those violations that were brought to its counsel's attention, Liberty received detailed explanations from counsel of the legal limits on its microwave operations.

Moreover, a further review of evidence in the case and publicly-available records suggests that Liberty activated a microwave facility serving 33 W. 67th prior to grant.

In weighing the credibility of Liberty's explanations for having activated microwave facilities in 1994 and 1995, the Presiding Judge needs to consider this evidence and evidence developed as a result of the requested additional discovery that flows from it. The public interest in candor from the Commission's licensees and applicants is well-established.

The Presiding Judge is empowered to take the requested action under the scope of the issues already designated; or he may designate a further issue under Section 1.229 of the Commission's Rules. While, if it is treated as a Motion to Enlarge, the instant Motion is a week late under the 15-day provision of Section 1.229, it should be considered on the merits under subsection (c) of Section 1.229. The matter is of decisional significance and affects the public interest. Also, good cause exists for the delay; and no one was prejudiced thereby.

Before the

Federal Communications Commission

WASHINGTON, DC 20554

In re Applications Of	:	
	:	
LIBERTY CABLE CO., INC.	:	
	:	
For Private Operational Fixed Microwave Service Authorization and Modifications	:	WT DOCKET NO. 96-41
	:	
	:	
New York, New York	:	

TO: Administrative Law Judge Richard L. Sippel

MOTION BY TIME WARNER CABLE OF NEW YORK CITY AND PARAGON CABLE MANHATTAN FOR LIMITED DISCOVERY AND THE TAKING OF ADDITIONAL HEARING TESTIMONY, OR, IN THE ALTERNATIVE, TO ENLARGE ISSUES

Pursuant to Section 1.229 of the Commission's Rules, Time Warner Cable of New York City and Paragon Cable Manhattan (collectively, "TWCNYC") hereby move for an Order permitting the taking of additional discovery and the taking of additional hearing testimony or, in the alternative, enlarging the issues in this proceeding to include the question of whether or not Liberty Cable Company, Inc. ("Liberty") was operating unlicensed OFS microwave facilities in calendar year 1993 and whether or not Liberty discovered that fact during that year. If the Presiding Judge grants this Motion as a Motion to Enlarge issues, TWCNYC contemplates seeking the same limited additional discovery and additional hearing testimony.

I. PRELIMINARY STATEMENT

The production of a document following the end of testimony at the hearing in this proceeding and the request of Liberty's FCC counsel to change his hearing testimony, together

with certain other information show that, in 1993, Liberty operated at least one unlicensed OFS facility, knew that it had operated an unlicensed facility and discussed the matter with its attorneys. This information only became available after the conclusion of the hearing. It raises a question of probable decisional significance and substantial public interest importance. Aside from being yet another instance of Liberty having violated the Communications Act and the Commission's Rules, this information has threefold significance to this proceeding: (1) it calls into question the veracity of Liberty's entire explanation of the circumstances of its unlicensed operations in 1994 and 1995; (2) it is further evidence that Liberty was not merely negligent with respect to carrying out its obligations as an FCC licensee but acted in knowing disregard of those obligations; and (3) it calls into question the reliability of the "compliance program" that Liberty's claims to have established to prevent a recurrence of the violations it committed in 1994 and 1995.

TWCNYC asks that the Presiding Judge either designate the requested issue (and allow for the limited discovery requested below) or re-open discovery and the hearing under the candor issues already designated by the Commission's Hearing Designation Order[1] in this proceeding. In either event, the depositions of Behrooz Nourain, Peter Price, Bruce McKinnon, Jennifer Richter and Howard Barr should be permitted to be held on this subject. Liberty should be directed to produce all documents relating to any of the subject of Jennifer Richter's April 20, 1993 letter, the activation of the microwave facilities serving 33 W. 67th Street and the application for authority to activate that facility.

---

[1]Hearing Designation Order and Notice of Opportunity for Hearing, 11 FCC Rcd 14133 (1996).

II. FACTS

A. The Richter Letter Of April 20, 1993

At the conclusion of the hearing, the Presiding Judge Ordered Liberty to produce to all the parties in the proceeding copies of Jennifer Richter's letter to Bruce McKinnon, dated April 20, 1993 (the "Richter Letter").[2] A copy of the letter was delivered by facsimile to the undersigned counsel's office on February 4, 1997.[3] The Richter Letter had first been identified in some handwritten notes made by Howard Barr of a telephone conversation he had with Lloyd Constantine on June 22, 1995.[4] Although the Richter Letter was within the scope of the request to produce documents in this proceeding served on Liberty by the Wireless Telecommunications Bureau on April 3, 1996, it was neither produced nor identified in the log of privileged documents generated pursuant to the Presiding Judge's Order issued in June.[5] At the time of the Richter Letter, Bruce McKinnon was the executive vice-president for Liberty in charge of operations.[6] Ms. Richter was an associate at the law firm of Pepper & Corazzini, who was handling Liberty's

---

[2]Order, FCC 97M-14 (rel. February 5, 1997).

[3]A true and correct copy of the Richter Letter (hearing exhibit TWCV 51) is attached as Exhibit A hereto.

[4]TWCV Exhibit 50.

[5]Order, FCC 96M-153 in WT Docket No. 96-41 (rel. June 13, 1996); See, Specification 7 of Request for the Production of Documents by Liberty Cable Co., Inc. (WTB, April 3, 1996): "All documents that contain support, pertain, relate or refer in any way to statements made by Mr. Behrooz Nourain to the Commission regarding the provision of multichannel video programming service." The letter relates to the various assumptions about the FCC licensing process that Mr. Nourain claimed he had in filings with the Commission in support of the May 17, 1995 Surreply and in the attachments to Peter Price's June 16, 1995 letter to the Wireless Telecommunications Bureau.

[6]Price Tr. 1352.

OFS licensing. The copy of the letter that was produced in response to the Presiding Judge's Order has a handwritten notation: "Peter: Pls. Review and advise. B.N. 4/28/93."

The first paragraph of the letter refers to several telephone conversations between Ms. Richter and Mr. Nourain:

> Behrooz Nourain and I have had several discussions recently regarding when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not. *Some things were revealed during these conversations that gave Behrooz and I pause.* In order to ensure that everything Liberty does is in strict accordance with the rules, and *to ensure that your competitors are given no ammunition against you,* I am writing this letter to detail the parameters within which construction and operation of new paths and new stations is permissible.

(Richter Letter at p. 1; emphasis added.)

By itself, this paragraph has one of two possible meanings: either Mr. Nourain told Ms. Richter that he assumed he could activate new microwave facilities before an FCC grant of authority, or he told her that he had actually done so, perhaps based on that assumption. Of the matters discussed in the letter, only a contemplated or actual activation before grant of FCC authority could both "give Behrooz and [Ms. Richter] pause" and "give ammunition to [Liberty's] competitors."

B. Howard Barr's Limitation Of His Hearing Testimony

On February 26, 1997, Liberty filed and served its "Motion to Correct Hearing Transcript."[7] Among the "corrections" sought were changes to the testimony of Howard Barr, at page 1796 and at page 1821. In both instances Mr. Barr wants to "clarify that I was focusing on the January, 1995 - April, 1995 time frame." This seemingly innocuous "clarification" is, in the

[7]A true and correct copy of the relevant page from Exhibit A to the Motion is attached as Exhibit B hereto.

first instance, a highly suggestive limitation in Mr. Barr's answer. The original transcript of the series of questions was as follows:

> **Q.** Did there come a time when you found out that Liberty Cable Company was providing service prematurely on paths that had not been authorized?
>
> **A.** Yes.
>
> **Q.** Do you remember when you found that out?
>
> **A.** I believe it was April 22nd [corrected to April 27th].
>
> **Q.** Before that date, did you have any idea that there was premature service being provided by Liberty Cable?
>
> **A.** No.
>
> **Q.** Before that date had you heard anybody suggest that there was premature service.
>
> **A.** No.

Barr, Tr. 1796; underlining added.

It is the last "No" answer that Mr. Barr seeks to limit. However, there is nothing ambiguous about either the questions or Mr. Barr's answers that calls for such a limitation. The only reason for such a limitation is that Mr. Barr had "heard somebody suggest that there was premature service" *before the January — April 1995 time period* and that Mr. Barr, conscious that he was under oath, did not want to testify falsely by answering "No" unconditionally.[8]

---

[8]Needless to say, had Mr. Barr chosen to limit his answer in this way during the hearing, there would have been a follow-up question directed to a time period other than January -- April of 1995.

Of course, it was Mr. Barr who thought of the Richter Letter while talking with Lloyd Constantine on June 22, 1995, since he wrote a reference to that letter in his notes of the call.[9] If it had been Mr. Constantine who had first brought the Richter Letter to Mr. Barr's attention on June 22, 1995, rather than the other way around, there would have been no need for the "clarification" that Mr. Barr made in his hearing testimony. The question that precipitated Mr. Barr's "clarified" answer was phrased "before that date," i.e. *before* April 27, 1995, the date Mr. Barr said he had learned of Liberty's unlicenced operations. If Mr. Barr had heard a suggestion of premature service *after* April 27, his unconditional "No" answer still would have been truthful. Only his prior knowledge of the Richter Letter, or the circumstances relating to it, requires Mr. Barr to limit his unconditional "No" answer to the question of whether he had ever heard anyone suggest that there was premature service before April 27, 1995.

Thus, Mr. Barr's "clarified" answer to a question in the hearing removes the ambiguity in the first paragraph of the Richter Letter. What was "revealed" in the discussions between Ms. Richter and Mr. Nourain that had "[given them] pause" was the fact that Liberty had been operating prior to grant, not merely that Mr. Nourain assumed he could do so.

C. The Apparent Premature Activation In 1993 Of Facilities Serving 33 W. 67th Street.

According to Liberty's business records, "installation" of customers at 33 W. 67th Street started in June 1993 and was completed by the end of that month.[10] That address is served by a

---

[9]TWCV Hearing Exhibit 50: "send Lloyd a copy of Jennifer's April 20, 1993 letter."

[10]TWCV Ex. 14 at p. 5. Testimony of Mr. Ontiveros established that "installation" of customers, as identified in the "installation" column of the reports would only begin once the signal was present in the building from the microwave or coaxial cable link. Ontiveros, Tr. 1723..

microwave path originating at One Lincoln Plaza. The application for those facilities was dated June 11, 1993 and has an FCC received stamp of June 16, 1993.[11] Thus, depending upon when in June (or earlier) the microwave facility service 33 W. 67th Street was activated, Liberty was operating either before it had FCC authority to do so or before it even had sought FCC authority to do so. The application (FCC Form 402) is signed by Behrooz Nourain, and Jennifer Richter is the contact person identified on the application. According to Liberty's business records, the contract for this property was signed on May 5, 1993.[12]

TWCV lacks sufficient information to perform a complete audit of the timing of all of Liberty's microwave facility activations against the date its applications were filed, and it is not necessary to do so for purposes of this Motion.[13] The evidence is clear, however, that, in 1993, Liberty activated at least one microwave path before it had authority to do so. Moreover, this "premature" activation took place *after* Ms. Richter had, both orally and in writing, briefed Liberty and Mr. Nourain as to "when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not."

---

[11]A true and correct copy of the application is filed as Exhibit C hereto.

[12]TWCV Ex. 14.

[13]Indeed, Liberty's initial production of the Installation Progress Reports redacted out references to every address except those identified in the Appendices to the HDO. Only the versions of the Installation Progress Reports that were produced by Order of the Presiding Judge after Liberty produced Mr. Lehmkuhl's February 24, 1995 Inventory of Licenses and Applications were produced in unredacted form. Order, FCC 96M-188 (rel. July 29, 1996).

III. ARGUMENT

A. The Issue Of Whether Or Not Liberty Operated Unlicensed Paths In 1993 And Was Warned By Legal Counsel About The Requirements Of The Communications Act And The Commission's Rules Is A Matter Of Decisional Significance And Implicates the Public Interest.[14]

Beginning with its Joint Motion for Summary Decision (with the Wireless Telecommunications Bureau), Liberty has consistently minimized the significance of its admitted unlicensed microwave operations in 1994 and 1995: "[T]he record also amply establishes, without contravention, that any violations of Commission rules by Liberty were unintentional and that

---

[14]Section 1.229 (a) of the Commission's Rules provides that "A motion to enlarge . . . may be filed by any party to a hearing. . . ."

In this case, TWCNYC discovered new facts only after it received Howard Barr's proposed corrections to his hearing testimony, on February 9, 1997. TWCNYC did not believe that the Richter Letter alone raised sufficiently substantial and material questions, but the Richter Letter and Mr. Barr's limitation of his answer do raise such questions. Under Section 1.229 (b)(3), a Motion to Enlarge would have been due on February 25, 1997, the next business day following the fifteenth day after the discovery of new facts. Consequently, as a Motion to Enlarge, this Motion is one week late. However, counsel were preoccupied with drafting the Proposed Findings of Fact and Conclusions of Law that were filed on February 28, including the entire weekend preceding February 25. No one has been prejudiced by the delay, and TWCNYC believes the need to complete the Proposed Findings and Conclusions by February 28 is good cause for the delay. (This Motion is being filed the next business day following the filing of the Proposed Findings and Conclusions.)

Moreover, even if the Presiding Judge finds a lack of good cause for the delay, Section 1.229(c) of the Commission's Rules provides that

> In the absence of good cause for late filing . . . the motion to enlarge will be considered fully on its merits if (and only if) initial examination. . . demonstrates that it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing.

TWCNYC believes it more than meets that test here.

Liberty always sought to be forthright and candid with the Commission."[15] Moreover, Liberty has argued that its past violations were *sui generis* and that a new compliance program (presumably described in detail in the "Internal Audit Report" that is unavailable to the private parties and the Presiding Judge in this proceeding) would ensure that these violations would not be repeated: "Liberty acted promptly to address the violations and established a compliance program that was carefully designed to avoid any future violations of applicable law, rules and regulations."[16] Consequently, Liberty argued, "Liberty's acts do not justify a finding that Liberty is not qualified to be granted the licenses that are at issue in this proceeding."[17]

In its recent Proposed Findings of Fact and Conclusions of Law, Liberty made similar arguments about its "lack of intent": "[T]he testimony adduced at the mini-hearing confirmed the Bureau's and Liberty's consistent position . . . that the premature activations resulted not from any intent to violate the law, but from a slipshod, disjointed and inadequately supervised licensing process."[18] Liberty also pointed out that it "has taken steps, such as the institution of an effective compliance program, to remedy the violations of law."[19]

Nor has the Bureau's fundamental position on Liberty's lack of "intent" changed after the hearing: "[the Bureau] does not believe Liberty intentionally turned on the paths without

---

[15]Joint Motion by Bartholdi Cable Co., Inc. and Wireless Telecommunications Bureau for Summary Decision (July 15, 1996) at ii-iii.

[16]Joint Motion at iii.

[17]Id.

[18]Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Company, Inc. (February 28, 1997) at ii.

[19]Id.

Commission approval."[20] Further, the Bureau is sanguine about Liberty's future behavior: "Because of the compliance program Liberty has set up, the Bureau has every reason to believe that Liberty will be reliable in the future, in following the Commission's Rules and Policies."[21]

The matters raised by the Richter Letter and Liberty's unlicensed operation in 1993 go directly to the truth of these propositions and to the core of the public interest question in this case: Is Liberty Cable Company fit to hold an FCC license? If Liberty was operating unlicensed in 1993, its argument that its unlicensed operations in 1994 and 1995 were "unintentional" and the products of a "negligent" licensing process is tenuous at best. If Behrooz Nourain revealed to Jennifer Richter in 1993 that Liberty was operating unlicensed and she thereafter told him (as her letter reflects) exactly what the company's legal obligations were, and if Peter Price knew all of this (as the notations on the copy of the Richter Letter that was made an exhibit suggest), then Liberty's argument that its unlicensed operations in 1994 and 1995 were merely the result of negligent supervision is not merely tenuous — it is deceptive.

Moreover, if, after having been told in April 1993 by its lawyer what its obligations were in complying with the law and the Commission's Rules, Liberty went ahead and activated an unlicensed facility less than two months later, then its vaunted "compliance program" is worthless. The reason that it is worthless is that a compliance program assumes that the entity wants to comply with legal requirements and that what is required is a system to ensure that legal requirements are observed. If, after having been informed as to what the legal requirements were

---

[20]Wireless Telecommunications Bureau's Proposed Findings of Facts and Conclusions of Law (February 28, 1997) at iv.

[21]Id.

in 1993, Liberty proceeded to violate them only two months later, not to mention violating them massively in 1994 and 1995, then there is no evidence upon which the Presiding Judge can conclude that Liberty wants to comply with the law. Liberty's self-serving statements to that effect in this proceeding and to the Commission certainly do not suffice.

B. The Scope Of The Issues Already Designated Makes Relevant Evidence About Liberty's Unlicensed Operations In 1993 And What It Was Told About Them By Its Legal Counsel.

Under designated issue (3) and (4) in this proceeding, evidence about Liberty's discussions with legal counsel about its licensing responsibilities, in light of unlicensed operations in 1993, is relevant.[22] In its May 17, 1995 Surreply, the first document in which Liberty disclosed to the Commission the fact that it had active, unlicensed OFS facilities, Liberty argued that: (1) its engineer, Behrooz Nourain, assumed grant of the STA requests, "which in his experience had always been granted within a matter of days of filing," (2) it had been its "pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave

---

[22]Designated Issue (3) is:
(a) To determine whether Liberty Cable Co., Inc., in relation to . . . its premature operation of facilities, misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission, and in this regard, whether Liberty Cable Co., Inc. has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

(b) To determine whether, based on 3(a) above, Liberty is qualified to be granted the above-captioned operational fixed microwave authorizations.

Designated Issue (4) is:
To determine, based on the evidence adduced in issues (1) through (3) above, whether Liberty Cable Co., Inc. possesses the requisite character qualifications to be granted the above-captioned private operational fixed microwave authorizations for which it has applied and, accordingly, whether grant of its applications would serve the public interest, convenience and necessity.

path operational" and (3) "in situations where contract requirements conflict with prevailing application processing times, Liberty has traditionally sought special temporary authority."[23] The fact of Liberty's unlicensed operation in 1993 *and the fact that such unlicensed operation was discussed between counsel and Mr. Nourain* contradicts each of the above three assertions. Even if Liberty's "pattern and practice" statement is intended to exclude the fifteen instances of unlicensed operations in 1994 and 1995, that statement is knowingly false if Liberty had unlicensed operations in 1993. Moreover, in the case of 33 W. 67th Street, apparently the contract requirement conflicted with the Commission's application processing times, yet, apparently, no STA was sought and, in any event, the facility was activated prior to grant. Finally, the admission of the Richter Letter into evidence at the hearing provides a relevance link between the evidence already admitted on the designated issues, and the additional evidence that TWCNYC seeks to collect and offer in the hearing.

C. The Requested Issue Is Appropriate And Is Justified By The Available Evidence.

A two-step analysis is applied to determine whether an enlargement of issues is appropriate under Commission Rule 1.229. Initially, the Commission looks to whether "a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]."[24] In so doing, the "Commission must proceed on the assumption

[23]TWCV Ex. 18.

[24]Astroline Com. Co. Ltd. Partnership v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988), quoting 47 U.S.C. § 309(d)(1) (parenthetical in original).

that the specific facts set forth [in the petition] are true."[25] Once this initial standard is met, the Commission looks to "the application, the pleadings filed, or other matters which it may officially notice" to determine if a "substantial and material question of fact" exists.[26] If a substantial and material question of fact has been raised, the Commission should conduct a hearing on the issue.[27]

The Commission has recognized that:

> In view of the fundamental importance of licensee truthfulness, the fact of a concealment or misstatement may have more significance that the actual fact concealed, FCC v. WOKO, 329 U.S. 223, 227 (1946), and we have explicitly refused to renounce our authority to consider even the most insignificant misrepresentation as disqualifying.[28]

Stated otherwise, the Commission views an applicant's misrepresentation and lack of candor as a serious breach of trust.[29] An applicant has a duty "to be forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is

---

[25]Id., quoting Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1985) (parenthetical in original).

[26]47 U.S.C. § 309.

[27]857 F.2d at 1561.

[28]San Joaquin Television Improvement Corp., 2 FCC Rcd 7004, 7005 (1987).

[29]Swan Creek Communications v. FCC, 39 F.3d 1217, 1221-22 (D.C. Cir. 1994). As the Commission has stated:

> Misrepresentations and lack of candor can indeed be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form.

KQED, Inc., 1988 FCC LEXIS 2646, *34 (Rev. Bd. 1988), aff'd, 5 FCC Rcd 1784 (1990).

particularly elicited."[30] "'[T]ruthfulness and full candor are as much expected in discovery as they are with respect to submissions to the Commission itself.'"[31] Accordingly, the Commission "is not expected to play procedural games with those who come before it in order to ascertain the truth."[32] For example, in Weyburn Broadcasting Ltd. Partnership v. F.C.C.,[33] the Commission was required to designate a misrepresentation issue for hearing because, at least in part, the testimony of the applicant's key witnesses conflicted with the documentary evidence.[34] As has been discussed at pp. 8-11, supra, the significance of Liberty's unlicensed operation in 1993 goes beyond being simply another instance of Liberty violating the law. It goes to the truth of Liberty's present statements that its violations in 1994 and 1995 were "unintentional," and it goes to the question of whether or not Liberty's "compliance program" is anything more than a sham concocted by its lawyers in anticipation of a proceeding like this one. Therefore, under the Commission's decisions, if this evidence is not already relevant, the requested issues should be added to make it so.

---

[30]39 F.3d at 1222, quoting Silver Star Communications, -- Albany, Inc., 3 FCC Rcd 6342, 6349 (Rev. Bd. 1988).

[31]Kate F. Thomas, 8 FCC Rcd 7630 (Rev. Bd., 1993), quoting Edwin A. Bernstein, 6 FCC Rcd 6841, 6844 n.6 (1991).

[32]Garden State Broadcasting v. FCC, 996 F.2d 386, 393 (D.C. Cir. 1993), quoting RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 457 U.S. 1119 (1982), 469 U.S. 1017 (1984).

[33]984 F.2d 1220 (D.C. Cir. 1993).

[34]See also Folkways Broadcasting Co., Inc., 33 FCC 2d 813, 816 (Rev. Bd. 1972) (granting motion to enlarge where evidence indicated that applicant had known of certain tape recordings about which it had formerly claimed ignorance).

IV. CONCLUSION

Therefore, TWCNYC requests that the Presiding Judge allow this additional evidence surrounding Liberty's unlicensed operations in 1993 and its and its lawyers' response to the fact of those operations to be collected through discovery. Upon conclusion of this limited discovery, the Presiding Judge is requested to include relevant additional documents and testimony in the hearing. Whether the Presiding Judge accomplishes this by adding issues or by direct Order under the designated issue is not important. What is important that it be done. The matters raised implicate the public interest in granting the requested applications and are of decisional significance.

Respectfully submitted,

Arthur H. Harding
R. Bruce Beckner
Jill Kleppe McClelland
Debra A. McGuire
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

Attorneys for
TIME WARNER CABLE OF NEW YORK CITY
and
PARAGON CABLE MANHATTAN

Dated: March 3, 1997

EXHIBIT A

1808

PEPPER & CORAZZINI

ATTORNEYS AT LAW

200 MONTGOMERY BUILDING

1776 K STREET, NORTHWEST

WASHINGTON, D.C. 20006

(202) 296-0600

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
LOUISE CYBULSKI #
JENNIFER L. RICHTER #

NOT ADMITTED IN D.C.

ROBERT LEWIS THOMPSON
GREGG P. SKALL
WILLIAM J. FRANKLIN
C. THEODORE HALLTCK
OF COUNSEL

FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572

April 20, 1993

Mr. Bruce McKinnon
Liberty Cable Co., Inc.
30 Rockefeller Plaza
Suite 3026
New York, NY 10020

Re: Construction and Operation of New Microwave Paths

Dear Bruce:

Behrooz Nourain and I have had several discussions recently regarding when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not. Some things were revealed during these conversations that gave both Behrooz and I pause. In order to ensure that everything Liberty does is in strict accordance with the rules, and to ensure that your competitors are given no ammunition against you, I am writing this letter to detail the parameters within which construction and operation of new paths and new stations is permissible.

First, there is a difference between construction and operation. An 18 GHz system can be constructed or modified at any time. However, operation of the new system, or operation of the system as modified, cannot commence until the authorization is in hand. Thus, when Liberty decides to serve a new building from a transmitter that is already part of a licensed 18 GHz system, the equipment necessary to serve the new building can be erected prior to grant of the modification application that adds the new microwave path. However, the new microwave path cannot be activated, and cannot be used to serve the residents of the new building with video programming, until the modified authorization is granted.

The time it takes the FCC to process new station and modification applications varies. Right now, the Microwave Branch is processing new station applications in 60-90 days. Modification applications take more time to process, somewhere around 90-120 days. These time periods are computed from the date upon which the FCC receives the application. Because of the lengthy processing time for modifications, the FCC says it will

grant STA's (special temporary authority to operate) when a modification application has been pending for more than 90 days.

The 60-90-120 days it takes for the FCC to process an application does not take into consideration the month it takes Behrooz, Comsearch and myself to prepare the application. Thus, Liberty's business plans should allow for the following: For new stations, allow for at least 90 days from your initial decision to construct a new transmitter before operations can begin; For modifications, allow for at least 120 days from your decision to add a new microwave path before operations can begin. Of course, construction of either type of station can begin as soon as the decision is made, but operation is only permissible when the FCC has granted you authorization to do so.

If Liberty is desperate to begin operation of a station, either new or modified, and grant of the underlying application is pending, let me know and we can apply for an STA. If you have constructed a new station or new path and want to test the equipment, you can request the use of Hughes' Experimental License. I believe Liberty has used the Experimental License in the past. As you may know, some private cable operators were using Hughes' Experimental License to serve subscribers while their station applications were pending. Hughes feels this behavior is in contravention of its authority under the license, and for this reason, Hughes is reluctant to permit operators the use of the Experimental License except in rare circumstances. If you would like to obtain the use of Hughes' Experimental License for specific paths, we should discuss it further.

If you have any questions or concerns relating to the foregoing, don't hesitate to contact me.

Yours truly,

JLR

Jennifer L. Richter, Esq.

cc: Mr. Behrooz Nourain

JLR/kaw
d:\wp\1808\opertn.ltr

EXHIBIT B

Howard Barr
Volume XIII: January 28, 1997

Page No.	Line No.	Change	Reason for Change
1790	5	"Ogelthorpe" to "Oglethorpe"	Misspelling
1790	11	"Emea" to "Femia"	Misspelling
1791	8	The word "wireless" is missing between the words "our" and "cable".	Apparant transcription error
1796	13	"22nd" to "27th"	Apparant transcription error
1796	20	Clarify that I was focusing on the January, 1995 - April, 1995 time frame.	To assure that the response is placed in its appropriate context.
1801	9	"I've" to "I"	Apparant transcription error
1803	19	"say" to "see"	Apparant transcription error
1807	2	The word "everybody" to "anybody"	Apparant transcription error
1821	16	Clarify that I was focusing on the January, 1995 - April, 1995 time frame	To assure that the response is placed in its appropriate context.
1842	6	Delete "yeah"	I do not recall responding affirmatively to the question and the follow-up question does not suggest that I responded affirmatively.
1851	25	"Jeckabowski" to "Jakubowski"	Misspelling
1852	9	"very best" to "Berry Best"	Apparant transcription error